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IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

IN RE: FIRSTENERGY CORP. CIVIL ACTION NO.  
SECURITIES LITIGATION 2:20-cv-3785

THIS DOCUMENT RELATES TO:  
ALL ACTIONS.

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HEARING HELD BEFORE  
SPECIAL MASTER SHAWN JUDGE

Thursday, December 21, 2023  
11:00 A.M.

Taken remotely via Zoom videoconference

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Job No. 6380892

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24 Michael Koslen, Esq., FirstEnergy  
25

1           P R O C E E D I N G S

2  
3           SPECIAL MASTER JUDGE: We're on  
4 the record. It's December 21st, 2023 at  
5 11:02 for our regularly scheduled status  
6 conference. I want to do a few  
7 housekeeping things and address any  
8 concerns of the parties.

9           The parties will note that  
10 yesterday we filed an order  
11 memorializing the briefing schedule that  
12 you've been adhering to on the pending  
13 motion for stay during the interlocutory  
14 appeal.

15           That will come on for an oral  
16 hearing on January 4th. I believe the  
17 reply brief is due January 2nd.

18           I will then be preparing a report  
19 and recommendation as a matter of the  
20 referral from Chief Judge Marbley and  
21 Magistrate Judge Jolson. Also probably  
22 realistically sometime shortly after  
23 Christmas I will be issuing a number of  
24 decisions, some of which have grown in  
25 length due to recent filings, including

1           the motion for reconsideration, I  
2           believe it's ECF number 592.

3                       So you can look for a number of  
4           decisions, I believe three or four  
5           decisions coming from me next week.

6                       One of the things I wanted to  
7           discuss today was the number of filings  
8           on the docket and my order in  
9           yesterday's order memorializing the  
10          briefing schedule noting that the  
11          parties have, as of late, been very,  
12          very active in filing things on the  
13          docket.

14                      Part of that is an outgrowth of  
15          there was a backlog understandably of  
16          motions that accumulated during the  
17          appointment process. We have been  
18          working, the parties with me, to get  
19          through that and get orders issued and  
20          that's going to result in an unusual  
21          amount of objections lately.

22                      For whatever reasons, all of you  
23          are not just accepting everything I  
24          decide as correct, and I understand  
25          that.



1                   One thing that was expressed to  
2                   me in recent conversations with the  
3                   Court, and I've had three recent  
4                   conversations in the past week, is that  
5                   the docket is looking a little crowded,  
6                   and I would urge you to file what is  
7                   necessary, of course, and what is  
8                   appropriate but also to use your  
9                   judgment as to what needs to be filed,  
10                  what could be filed in one document  
11                  versus multiple documents and the  
12                  length.

13                  We have been hesitant to impose  
14                  page limits in any of the briefing here  
15                  because of the importance of a lot of  
16                  the issues. I mean, I think these are  
17                  issues not to be minimized. You know,  
18                  it's not hyperbolic to say that in some  
19                  sense they may be case dispositive in a  
20                  few ways; but some of these discovery  
21                  decisions in particular are very  
22                  important, and I realize you want to be  
23                  afforded your say. I want you to have  
24                  the ample opportunity and room; but when  
25                  we start getting multiple 40 and 50 page

1       briefs that are often redundant, the  
2       Court's less than happy, which makes me  
3       less than happy and I'm eager to spread  
4       that pain on to you and make you less  
5       than happy during the holiday season.

6               So I would just, my only  
7       admonition to you is keep it concise.  
8       The Court's familiar with a lot of the  
9       issues here. The background is not very  
10      complex even if the issues are legally  
11      nuanced, and we're getting a lot of  
12      briefing. You know, I waded through the  
13      briefing that was filed yesterday  
14      including the objections and it's a  
15      slog. It doesn't always have to be but  
16      when we're getting 50-page objections on  
17      very discrete issues, keep in mind I  
18      hope nobody is paying their client --  
19      that no client is paying their attorney  
20      by the word, and I'll just leave it by  
21      that. No page limits are going to be  
22      imposed yet but they could be  
23      forthcoming.

24             The second issue I want to talk  
25      about is the parties had raised issue by

1 email of could we discuss the meet and  
2 confer obligation in light of my order  
3 that nothing substantive be filed  
4 without getting permission from me  
5 first.

6 This excludes things like  
7 objections when you know that you have a  
8 right to file previously from the Court.

9 It also excludes things that  
10 require mainly ministerial acts from the  
11 Court like motions to withdraw, change  
12 of address, pro hac vice, those kinds of  
13 things.

14 My view of it is it's always  
15 better to talk and try to work it out.  
16 I realize that that is not always  
17 successful, rarely successful, it's not  
18 always even possible or pragmatic but I  
19 ask that before you file something and  
20 contact me, you make at least a cursory  
21 effort to meet and confer and obtain the  
22 other side's position to see if there's  
23 any middle ground.

24 You know, a lot of this stuff I  
25 think we could just have a conference

1           and work it out hopefully in the future  
2           as opposed to a lot of briefing.

3                   I think the thing that triggered  
4           the parties to send me an email was the  
5           motion for reconsideration.

6                   Mr. Forge, what in particular was  
7           the concern about meet and confer  
8           obligation in the motion for  
9           reconsideration?

10                   MR. FORGE:     Well, our concern  
11           was that we've had for months and months  
12           a process where each week everybody had  
13           blocked off Tuesday at 9:00 a.m.  
14           Pacific, noon Eastern to meet and  
15           confer, and we have had attorneys who  
16           have been very diligent about sending  
17           emails asking for any issues to discuss  
18           and that process has been followed  
19           faithfully including last week and last  
20           week when the email went out asking if  
21           there are any issues to discuss, no one  
22           indicated a desire to discuss anything  
23           and so the Tuesday call was cancelled  
24           and then the next thing we know, there's  
25           two motions filed the next day where

1           there had been no indication whatsoever  
2           of a meet and confer. All we received a  
3           couple hours before they were filed was  
4           a cursory email saying hey, we're doing  
5           this. Do you agree or not agree?

6                       And even in response to that, I  
7           sent a one-paragraph response and asked  
8           that it be, the response be included if  
9           they're going to reference any position  
10          of the Plaintiffs and yet FirstEnergy  
11          disregarded that, they disregarded the  
12          meet and confer process and they simply  
13          said that the Plaintiffs and I believe  
14          Defendants Jones and Dowling did not  
15          consent.

16                      And so it just seemed to me to be  
17          so wasteful, and so we keyed this up to  
18          discuss what everybody's understandings  
19          are for this past Tuesday, and during  
20          that call FirstEnergy refused to relent  
21          and continued to maintain that what they  
22          did was perfectly appropriate and that  
23          they are perfectly entitled to continue  
24          doing what they did and they also said  
25          that well, these aren't, these weren't

1           discovery related and therefore we had  
2           no obligation to meet and confer to  
3           which I responded, well, look, we're  
4           just going to wind up bickering about  
5           what is discovery related.

6                   Obviously these, both of these  
7           things are related to discovery. One of  
8           them is reconsideration of a discovery  
9           order and the other one is a request to  
10          consolidate briefing concerning  
11          discovery orders; so I don't, if we're  
12          going to start -- it just feels like  
13          FirstEnergy started to just multiply  
14          these proceedings and kind of create new  
15          categories of dispute, so now the new  
16          category is going to be, okay, let's  
17          argue about whether this relates to  
18          discovery, and I just feel like both  
19          sides -- and it's happened to me as  
20          well -- I think having somebody neutral  
21          like yourself just compels both sides,  
22          and I should say all sides because  
23          there's not necessarily only two here,  
24          but it compels everybody to be a little  
25          more reasonable, and I take full

1 responsibility for sometimes changing my  
2 position in your presence, and I just  
3 think that in order to be productive or  
4 at least to be less inefficient, now  
5 that you've set out the ground rules  
6 that there has to be leave to file  
7 anything other than something that's  
8 already expressly authorized or  
9 perfunctory, I think it should be  
10 beholden on everyone to meet and confer  
11 on the Tuesday about it and then if it's  
12 something that perhaps can be addressed  
13 and resolved in a Thursday status  
14 conference, we give it a shot.

15 If it's clear that everybody has  
16 dug in and/or it's too complex, then you  
17 can certainly tell us that and then  
18 we'll follow, you know, a more formal  
19 process, but, I don't know, maybe I'm  
20 being naive, but I just, things like, I  
21 mean, the motion for reconsideration.  
22 My interpretation of what you had  
23 indicated to the parties is that if you  
24 had clearly missed something, you'd be  
25 amenable to some sort of a request for

1 reconsideration but it just seems like  
2 if a motion for reconsideration is 20  
3 pages long, it's probably not a clear  
4 error. I mean, if it takes 20 pages to  
5 explain what the alleged mistake was,  
6 it's probably not a clear error and  
7 probably not the type of issue that is  
8 appropriate for a motion for  
9 reconsideration, but at a minimum we  
10 could have discussed just how, whether  
11 Chief Judge Marbley even intended to  
12 allow parties to file motions for  
13 reconsideration because there's a very  
14 strict schedule for objections and the  
15 case law is clear. We set it out in our  
16 papers: Once an objection is filed,  
17 just like a notice of appeal, that  
18 shifts jurisdiction to Chief Judge  
19 Marbley and Judge Jolson; so if we have  
20 a 21-day objection deadline, it does not  
21 accommodate a five-week briefing  
22 schedule for a motion for  
23 reconsideration, which then poses on you  
24 the need to file another order and which  
25 then, as FirstEnergy itself indicated,



1           then they're going to file another  
2           objection to the order denying the  
3           motion for reconsideration.

4                       So I just think we're heading in  
5           the wrong direction at the fault of the  
6           parties and I think we all bear some  
7           responsibility for that and the best  
8           course to take is to just simply say:  
9           Hey, if you have an issue, key it up in  
10          the meet and confer call on Tuesdays.  
11          If it doesn't work out, let's talk about  
12          it on Thursday and figure out what the  
13          best way to proceed is from there. So  
14          that's just, that's the ask on behalf of  
15          Plaintiffs.

16                       SPECIAL MASTER JUDGE: Thank you,  
17           I appreciate it.

18                       Mr. Rein/Mr. Giuffra, would you  
19           like --

20                       MR. GIUFFRA: Yes, I would like  
21           to respond.

22                       I couldn't agree more that we  
23           want to try to avoid unnecessary  
24           pleadings, unnecessary filings,  
25           unnecessary litigation.

1           The issue that we're arguing  
2           about is one of enormous importance to  
3           FirstEnergy. It's an issue that  
4           candidly I think you had a glimpse of  
5           our papers. We think that the idea that  
6           there should be, you know, open season  
7           discovery into an internal investigation  
8           that was conducted in response to the  
9           Department of Justice's investigation,  
10          the filing of lawsuits including in this  
11          case within days, we think is  
12          extraordinary and, you know, candidly  
13          I've been involved in doing  
14          investigations for 25 years and this is  
15          the first time I've ever seen a court  
16          order of this kind of discovery.

17                 So part of the reason that we're  
18                 having this dispute is because the  
19                 Plaintiffs are making an extraordinary  
20                 request and have basically tried to  
21                 persuade you, Mr. Judge, to agree to  
22                 give them discovery that candidly we  
23                 don't think they're entitled to.

24                 Now, at the very first conference  
25                 you said something that I think is

1           absolutely correct: If there's a basis  
2           to reconsider a decision, let me know if  
3           I made a mistake. That's intended to  
4           try to simplify the proceedings and now  
5           we're going to be in a situation where  
6           we file these objections and then there  
7           will be new arguments, a new  
8           reconsideration motion and that was what  
9           prompted our coordination. We wouldn't  
10          file the papers that we filed in  
11          response to just some mere discovery  
12          dispute, but this is the discovery  
13          dispute that candidly really goes into  
14          the ability of the Plaintiffs to  
15          literally go into the files of opposing  
16          counsel and rummage through them.

17                 I guarantee that if we were  
18          looking to do that to Mr. Forge, he  
19          would be objecting vociferously. Now  
20          with respect to the issues that we  
21          raised in the reconsideration motion,  
22          there basically are two.

23                 The first one is the O'Neil  
24          declaration which was an issue that  
25          Plaintiffs didn't raise, you didn't

1       raise at the oral argument and candidly  
2       as I indicated last time we met was an  
3       omission that was caused by the fact  
4       that we were taking a document that was  
5       drafted as an affidavit and turning it  
6       into a declaration, and I can't imagine  
7       that, you know, because of what can only  
8       be described as at best, and we think  
9       it's not even necessary to have the word  
10      true in there anyway, and there's case  
11      law that supports us, that that mere,  
12      you know, scrivener's error should  
13      suddenly allow for the wholesale  
14      discovery into what Jones Day and  
15      Squires did for the board of directors  
16      of FirstEnergy.

17               That's our position, and it's a  
18      position we feel strongly about. We'll  
19      take it to Judge Marbley. I was hoping  
20      in filing the reconsideration motion  
21      that you might take a different view and  
22      decide the issue on the merits rather  
23      than on what I view as a sort of a side  
24      show issue.

25               But in addition in look at your

1 decision, we obviously had presented a  
2 lot of other evidence that's not  
3 referenced in the decision including  
4 evidence that the Plaintiffs had  
5 referenced making clear about why the  
6 investigations were done, including  
7 public filings of FirstEnergy, and one  
8 of the clear reasons why one does a  
9 motion for reconsideration is to advise  
10 a court or a special master or a  
11 magistrate of materials that they  
12 overlooked.

13 So our objective in all of this  
14 was to simplify the process and if  
15 anything, you know, allow you the  
16 opportunity to reconsider your decision  
17 and maybe avoid an objection going to  
18 Chief Judge Marbley or Magistrate  
19 Jolson.

20 That was our objective and it was  
21 not to multiply the proceedings or do  
22 anything like that. And the reason why  
23 we want to put off the objections was  
24 because, well, maybe we were hoping you  
25 might reconsider all or part of your

1 decision. One, you could say well,  
2 we'll let the O'Neil declaration come in  
3 and we really had no ability to brief  
4 that issue, and then maybe you would  
5 decide the issue on the merits either  
6 for us or against us after you looked at  
7 all the evidence including the evidence  
8 that was not referenced in the opinion  
9 and then we would avoid a discovery  
10 dispute potentially before the Chief  
11 Judge. So that was the motivation for  
12 what we did.

13 Now, did Mr. Forge have an  
14 opportunity to raise -- you know, did we  
15 confer with him? Yes, we did. Now was  
16 it a discovery dispute? No, it was not.  
17 It was a reconsideration motion and the  
18 coordination motion was a scheduling  
19 issue and had we followed some lengthy  
20 meet and confer process, it would have  
21 been pointless. They had won the  
22 motion. Okay? They weren't going to  
23 say oh, don't file the motion for  
24 reconsideration. And on the issue of  
25 the schedule, if we had conferred for

1 two weeks, it would have, the time would  
2 have elapsed.

3 I would also note we take the  
4 obligation to meet and confer quite  
5 seriously and at the last status  
6 conference we had the issue of the  
7 privileged documents came up. That had  
8 been raised the day before. The process  
9 had not been followed and that was the  
10 Plaintiffs not following the process, so  
11 we feel strongly that we should follow  
12 the process but, you know, to sort of,  
13 to explain really what's motivating all  
14 the filings is that this is an  
15 extraordinary issue. It's very  
16 important in the case and we think that  
17 the Court should get it right.

18 And on this issue of you being  
19 divested of jurisdiction, you are a  
20 special master appointed by the district  
21 judge. This is not like an appeal where  
22 the, you know, notice of appeal divests  
23 the District Court of jurisdiction. You  
24 are the District Court. All power you  
25 have comes from the District Court.

1           You're not an Article III judge. You're  
2           not a magistrate. You're someone who's  
3           operating at the behest of the District  
4           Court, who's providing a role with the  
5           District Court, so there's no divestment  
6           of jurisdiction. I'm quite confident of  
7           that.

8                       So that's the explanation for why  
9           we did what we did. It's a very  
10          important issue. We think Plaintiffs  
11          are grossly overreaching and we intend  
12          to litigate the issue with Chief Judge  
13          Marbley if we have to beyond that  
14          because we think it's a very important  
15          issue and, you know, maybe the briefs  
16          could be shorter. I couldn't agree with  
17          you more, and I apologize to the extent  
18          the briefs are not, you know, are not  
19          shorter. My father was a lawyer and he  
20          always reminded me that Abraham Lincoln  
21          said if you could write a three-page  
22          letter, you'd have enough time -- when  
23          you write a ten-page letter, you'd have  
24          enough time to write a three-page  
25          letter, so we will try to make the



1           briefs shorter but we have no interest  
2           in a multiplicity of proceedings or  
3           anything like that. It just happens  
4           that this particular issue, which goes  
5           to something that's a bedrock  
6           protection, the attorney/client  
7           privilege, is something that we feel  
8           very strongly about and we're going to,  
9           you know, litigate our position on this  
10          issue.

11                   SPECIAL MASTER JUDGE: I  
12          appreciate that. Thank you.

13                   I think that, well, just some  
14          general comments. You know, one thing  
15          to obviate the dispute of whether  
16          something is discovery related or  
17          whether it's tangential to discovery but  
18          still involved with discovery or  
19          tangential enough that we can consider  
20          it remote from discovery, just meet and  
21          confer over everything that there might  
22          be -- you know, just meet and confer.  
23          And I get it. Often parties, especially  
24          in big litigation, especially in a  
25          litigation like this, you know, treat

1           the meet and confer process as just a  
2           check the box requirement on their way  
3           to filing. That's fine, but I think  
4           there is utility to talking no matter  
5           what the subject of the motion is.

6                     You know, don't call up the other  
7           side and say you're going to oppose  
8           their motion to change their address or  
9           notice of withdrawal of counsel or  
10          anything like that. You know, everybody  
11          is way too busy for that. But if it's  
12          anything substantive, you know, if you  
13          would have called up Mr. Forge and said  
14          we're going to file a motion for  
15          reconsideration, what do you think? And  
16          he would be like, you know, on second  
17          thought, really let's look at the  
18          declaration, you know, I'd be surprised.  
19          I would want to be part of that phone  
20          call. That would be amazing but, you  
21          know, it doesn't hurt to ask about a lot  
22          of these issues. You know, the  
23          coordination of the briefing issue, you  
24          know, if both sides agreed to it, let  
25          the Court know, let me know, you know,

1 even if you had agreed to it, it's not  
2 going to change the deadlines of the  
3 briefing unless there was an order  
4 saying, yes, we approve of the deadlines  
5 being changed; but just as a general  
6 overarching principle, let's do a meet  
7 and confer.

8 I'm not going to say you guys  
9 have to do it every Tuesday. You know,  
10 I'm not here to micromanage it, and  
11 you're all adults. Just meet and confer  
12 ahead of time and give the people enough  
13 time. You know, as a practitioner when  
14 I'm practicing it drives me insane when  
15 I get something 15 minutes before a  
16 filing deadline and it's 30 pages and  
17 they say do you oppose this or not?  
18 We're going to file in 15 minutes.  
19 That's not a meet and confer. That's  
20 not substantive. That's nonsense. So  
21 don't do that. Give them enough time,  
22 meet and confer. If there's anything  
23 that needs discussed and you can't  
24 agree, and most often I think you're not  
25 going to agree, and there's no common

1 ground, then we'll do a status  
2 conference, either a normal Thursday  
3 conference or we'll schedule something  
4 extra; but don't be hesitant to reach  
5 out to me.

6 We may not always need 41  
7 different, you know, boxes on the screen  
8 with multiple participants to resolve it  
9 but, you know, we could do it, just do a  
10 quick call. We could do it sometimes by  
11 email. We could do it through a Zoom  
12 call, but let's try to curb the amount  
13 of filings in the future as a general  
14 proposition. Have a meet and confer.  
15 If you can't resolve it, reach out to  
16 me, we'll discuss it and then we'll  
17 permit filing if something needs to be  
18 filed.

19 I think you'll find throughout  
20 the process I'm always going to be  
21 available to you. I will make myself  
22 available. I don't care if we're doing  
23 status conferences at 11:00 at night.  
24 You will get a status conference. You  
25 will get an opportunity to be heard. I

1 think the length of some of our oral  
2 arguments, if nothing else, should  
3 convince you that I'm very concerned  
4 that everybody be afforded enough time  
5 to be heard. I don't put time limits on  
6 attorneys -- well, now that I say that,  
7 you know, nobody pushed it. There will  
8 be time limits if we have to impose  
9 them, but I generally disfavor time  
10 limits from anyone.

11 I want attorneys to be heard, to  
12 have their piece. I want to understand  
13 fully your arguments; and for motions  
14 for reconsideration, yeah, technically  
15 they don't exist. I get that. It's an  
16 interlocutory decision; however it's  
17 subject to any time being revisited.  
18 You know, if I blow something, you know,  
19 if I misread the law and you just think  
20 I'm an idiot, that's something that  
21 you're probably not going to persuade me  
22 of on reconsideration. However, if I  
23 issue something and I say there's  
24 absolutely no evidence to support X, Y  
25 and Z and you say well, you didn't look

1 at document number 4. You know, that's  
2 the kind of thing for a motion for  
3 reconsideration. Let me know. Because  
4 then I just made a mistake; but if you  
5 just disagree with the substance of my  
6 reasoning, you can try a motion for  
7 reconsideration, it's rare, you know,  
8 and I would give myself all kind of  
9 credit if I can then sit back and say  
10 you know what, they're right, but it's  
11 happened. It's happened when I was a  
12 law clerk. It's happened when I was a  
13 practitioner. It could happen as a  
14 special master, too; but if you're just  
15 going to regurgitate the same argument,  
16 you're probably better on your way to  
17 file the objections and move up the  
18 chain on your way to justice that way.

19 But, you know, I don't begrudge  
20 anyone, given the nature of the filings  
21 here. You know, these are important  
22 issues and they matter to this case in  
23 particular a great deal and the related  
24 cases a great deal. File what you need  
25 to file, but let's get permission first

1           when we need to.

2                       I like the proposition, I think  
3           Mr. Forge said if it's 20 pages long,  
4           that I clearly have not made an error or  
5           a clear error. You know, I don't know  
6           if that's the standard, but let's see  
7           what Judge Marbley thinks about that. I  
8           like that one, though.

9                       So bottom line: Try to work it  
10          out. I'm not going to impose regular  
11          meet and confers, but do so and I'd like  
12          to reinforce that even if the parties  
13          have nothing, file a joint status report  
14          before our conferences just letting me  
15          know what's on your mind or what's  
16          coming. You know, by email would be  
17          fine. I don't even need a formal joint  
18          status report filed on the docket. If  
19          you guys shoot me a joint email as you  
20          did yesterday saying we want to talk  
21          about the meet and confer process, just  
22          so I can anticipate and think it through  
23          a little bit myself. That's always  
24          helpful.

25                      And I apologize, I seem to be

1           getting a weird glow through the blinds.

2                   MR. FORGE:     I think it's the  
3           sun.

4                   SPECIAL MASTER JUDGE:     It is the  
5           sun. I'm in a different location than  
6           normal. I like to think I'm bathed in a  
7           heavenly light here; but I, you know, if  
8           anything it's just --

9                   MR. GIUFFRA:     I have that  
10          problem with my office in the wintertime  
11          exactly which is why I tend not to do  
12          these calls from my office because I  
13          can't even see.

14                  SPECIAL MASTER JUDGE:     I didn't  
15          go into the office today because I'm  
16          packing because I'm moving shortly and I  
17          thought this would be something I could  
18          do from home and that's wildly  
19          convenient. I apologize for the image.

20                  MR. GIUFFRA:     The issue, if I  
21          could just raise it, which I think is  
22          related to what we were talking about --

23                  SPECIAL MASTER JUDGE:     Yes.

24                  MR. GIUFFRA:     -- because I do  
25          think it's useful to at least have more



1 informal discussion with you and with  
2 the Plaintiffs.

3 Again, you know, I think that the  
4 objective I think of this process should  
5 be to have a full vetting of all of the  
6 issues; so part of what we were trying  
7 to do with that motion was obviously we  
8 thought that there was evidence that at  
9 least wasn't referenced in the order and  
10 that's why if you look at the brief that  
11 we submitted on reconsideration, there's  
12 like whole pages of just summaries of  
13 the evidence that wasn't referenced.

14 Now, if you do a reconsideration  
15 motion and rule on that and then you  
16 consider the evidence and then we have  
17 these objections which we filed  
18 yesterday, we still reference whatever  
19 points you raise in your reconsideration  
20 order, and what we're concerned about  
21 and what really animated what we did was  
22 this problem of then Chief Judge Marbley  
23 will get another filing and say what are  
24 these people filing another thing and  
25 so, you know, again, it's a very

1           important issue, but what we were trying  
2           to do was get it all -- not put off  
3           deadlines, not delay the case but get an  
4           issue that I think is a very important  
5           issue fully vetted by you and by  
6           Plaintiffs and by us before it got to  
7           Chief Judge Marbley. And now what I'm a  
8           bit concerned about candidly is we've  
9           got these objections that have been  
10          filed based on the original order that  
11          was entered in late November and then  
12          there will be a new order maybe making  
13          different points and so, you know, the  
14          one concern I have is then do we file  
15          another set of objections. I think that  
16          was something you just referenced, and  
17          that was sort of what motivated the  
18          motion. Nothing more, nothing less.

19                 And again just to make sure that  
20          I -- obviously everyone on this call has  
21          been doing this a long time and it's  
22          really, you know, you want to get a  
23          decision, you want the decision to be  
24          the right decision. You want the  
25          decision to be on the merits if possible

1           and then you take it to the next level  
2           if you need to, the winner or the  
3           loser -- or the loser.

4                   And that really was the sole  
5           objective of the filings that we made  
6           was really, you know, when I looked back  
7           at the decision on what is a really  
8           important issue, it's on a, you know, a  
9           one missing word and, you know, I just  
10          don't think that's the kind of basis for  
11          a decision like this and particularly  
12          when the Plaintiffs didn't even raise  
13          it, you didn't raise it at the oral  
14          argument. We had really no knowledge of  
15          the issue until the decision came down  
16          and then we kind of back-tracked and saw  
17          what had happened and so the idea was  
18          well, decide it on the merits then, and  
19          then on the merits, the issue from our  
20          perspective was it was evidence beyond  
21          the declaration that wasn't considered.  
22          So, you know, you can obviously look at  
23          the evidence and come out differently  
24          than I would but I'd like to just -- our  
25          goal was to get it all decided in a way

1           so that it was packaged for Chief Judge  
2           Marbley. And what I'm concerned about  
3           now is sort of we've got the objections  
4           to the prior order, then we have the  
5           reconsideration motion and I think it  
6           could present some issues.

7                   SPECIAL MASTER JUDGE: Let me  
8           allay your concerns in this regard: I  
9           don't think it will present issues.  
10          He's well aware of the issues and he's  
11          aware of that I'm going to be putting  
12          out an additional order and that we'll  
13          be addressing the motion for  
14          reconsideration.

15                   I disagree with your  
16          characterization that I didn't consider  
17          the other evidence. I did and found it  
18          wanton. And I expressed that in the  
19          prior order. I didn't go through each  
20          piece of evidence. You know, in the  
21          motion for reconsideration you said,  
22          well, we presented ample evidence and  
23          then you spent about a page-and-a-half  
24          referring to the O'Neil declaration  
25          again and then you had a page where you

1           gave us a bullet point list of some  
2           other items of evidence which just  
3           require too much of an inferential gap  
4           between what you're trying to ask us to  
5           conclude or ask me to conclude and what  
6           those pieces of evidence represented,  
7           and I appreciate and understand that you  
8           disagree; but what I'll do in the motion  
9           for reconsideration is make it very  
10          clear, and Judge Marbley knows that  
11          that's coming.

12                 MR. GIUFFRA:     My only point was  
13          that the order, which I think is  
14          November 29th, although it could be the  
15          28th, the main order doesn't reference  
16          any of the other evidence so that was  
17          the reason why, one of the reasons that  
18          we filed the motion for reconsideration.

19                 SPECIAL MASTER JUDGE:     No, I  
20          understand.   No one begrudges you filing  
21          that and, you know, however you  
22          characterized it, the content of it is  
23          completely logical and sensible to me to  
24          be filed and it's in front of the Court.  
25          The Court's aware of what else is

1           coming. I don't think you have to worry  
2           about the Court lacking context or that  
3           the information is going to flow to the  
4           Court in a piecemeal way. The Court has  
5           been made quite aware of what's coming  
6           and, you know, my perspective on it, so  
7           it's all going to be in front of the  
8           judge to look at.

9           MR. GIUFFRA: Yeah, and I guess  
10          we could file the objections to the  
11          reconsider -- we'll figure it out.  
12          That's the main objective.

13          SPECIAL MASTER JUDGE: Yeah.  
14          And I do think it's useful. As you put  
15          it, too, to maybe talk a little bit more  
16          informally, too. We could do that with  
17          or without a court reporter but I think  
18          to hash out a lot of these issues along  
19          the way might provide clarity to the  
20          parties, too. And -- go ahead.

21          MR. GIUFFRA: Fully agree. I  
22          mean, again, I just wanted you to  
23          understand what the motivation was. I  
24          would not ordinarily, you know, litigate  
25          an issue of a discovery dispute like

1           this one unless it was a very important  
2           issue and this one happens to be a very  
3           important issue.

4                   SPECIAL MASTER JUDGE:     I get it.  
5           I mean it's a huge issue. You know, I  
6           said potentially it's case dispositive.  
7           That may be overstating it a bit but it  
8           is certainly the biggest discovery issue  
9           I think in the case and I can't imagine  
10          a more critical discovery issue than  
11          this one, so I get why you're concerned  
12          and I get your, I get the course of  
13          action you've taken and why.

14                   MR. GIUFFRA:     Okay. That's all.  
15          Again, I just wanted to be clear that,  
16          you know, we have no interest in  
17          creating a multiplicity of proceedings  
18          or filing unnecessary briefs. It's all  
19          because of the nature of this particular  
20          dispute.

21                   SPECIAL MASTER JUDGE:     Yep. I  
22          got it.

23                   MR. GIUFFRA:     Okay. Thank you  
24          very much.

25                   SPECIAL MASTER JUDGE:     What else

1 do we need to talk about?

2 That's, the meet and confer  
3 issue, I think it's clear. Do it. Try  
4 to make it useful. If it doesn't  
5 provide an answer, contact me before  
6 filing and we'll work it out.

7 We have the reply brief that will  
8 be concisely written and tight. That's  
9 coming up on the 2nd I believe. Oral  
10 argument on the 4th.

11 What else do we need to talk  
12 about? What is going on between the  
13 parties or what is troubling the  
14 parties?

15 MR. FORGE: From the Plaintiffs'  
16 perspective, Mr. Judge, we're just  
17 trying to get this case back on track  
18 with discovery and I think that's all  
19 that's going on for us is just waiting  
20 for that January 4th hearing and  
21 hopefully making some progress on  
22 getting back to these depositions.

23 SPECIAL MASTER JUDGE: Good. I  
24 appreciate that.

25 MR. GIUFFRA: The only concern



1 we have, just to put it out there,  
2 because I think it is important to get  
3 this, you know, get it on the record so  
4 it's clear, is in yesterday's order, you  
5 know, obviously the requirement that we  
6 reach out to you on something other than  
7 an objection or a ministerial order, we  
8 will comply with that but the only  
9 concern we have is obviously there are  
10 deadlines and motions and filings we  
11 have to make during the course of a case  
12 like this and we assume that we'll be  
13 able to make those motions that are  
14 provided for, you know, under the rules  
15 and be able to preserve all of our  
16 rights and I assume that the intent of  
17 the order of yesterday was just to sort  
18 of if you're going to file something,  
19 let's talk about it first rather than,  
20 you know, I'm going to control what you  
21 can file because obviously I don't think  
22 that an order that limits the parties'  
23 ability to file motions that are  
24 authorized by the Federal Rules, I don't  
25 think that can be circumscribed by a

1 court order.

2 I mean unless someone is like a,  
3 there are cases involving frivolous  
4 filers who, like, you know, so there's a  
5 case called In Re: Martin-Trigona where  
6 somebody filed hundreds of filings and  
7 tried to, you know, do all sorts of  
8 crazy things with the court. That's not  
9 I don't think what we're talking about  
10 here.

11 SPECIAL MASTER JUDGE: Well,  
12 despite the fact that I think in a very  
13 polite, professional way you just told  
14 me you expect me to follow the law and  
15 do my job, which I'm presumptively going  
16 to do, I'm not going to declare you a  
17 vexatious litigator. You don't need to  
18 worry about it. No.

19 The purpose of the order is let's  
20 talk before you file something because  
21 we may be able to obviate the need for  
22 it.

23 MR. GIUFFRA: That's perfectly  
24 fine.

25 SPECIAL MASTER JUDGE: Yeah.

1 We're going to let you file what you're  
2 allowed to file. We're going to let you  
3 file what you need to file. We're going  
4 to let you file stuff even if you  
5 shouldn't file it and it's strategically  
6 dumb, we'll still let you do it and  
7 we're going to consider it because  
8 that's, I get paid to read it and to  
9 make a decision to the best I can. Same  
10 thing with Magistrate Judge Jolson.  
11 Same thing with Chief Judge Marbley.

12 If we only let attorneys file  
13 things that we thought was useful, the  
14 docket would be a lot less in every  
15 single case but we'd probably not have a  
16 whole lot to do with it. So don't  
17 worry. No one's going to, we're not  
18 looking to circumscribe your filing  
19 authority or encroaching on anything  
20 that you need to file. You're going to  
21 get permission to do it. The hope is  
22 that, you know, if you're going to file  
23 something and through 15 minutes of  
24 discussion or 30 minutes of discussion  
25 or beating up on Mr. Forge or vice versa

1           we can come to an accommodation and  
2           avoid the filing and get everyone moving  
3           along without briefing, it's still much  
4           better.

5                   MR. GIUFFRA:     Fully agree.  
6           Fully agree.

7                   SPECIAL MASTER JUDGE:     Yeah.  
8           Excellent.

9                   MR. GIUFFRA:     I'd prefer not to  
10          stay up at night and mark up briefs.

11                   SPECIAL MASTER JUDGE:     You know,  
12          I -- when Chief Judge Marbley called me  
13          and said I'm doing this, I figured this  
14          is my life for the next two years. I'm,  
15          you know, I belong to you guys. If I  
16          have to stay up late and do this kind of  
17          stuff, you know, on Christmas Day I'll  
18          probably be working on your motions, so  
19          don't worry about it.

20                   MR. GIUFFRA:     Okay. Thank you  
21          very much.

22                   SPECIAL MASTER JUDGE:     All right.  
23          Anything else on behalf of either side  
24          before the 4th?

25                   MR. GIUFFRA:     Just have a nice

1 holiday and a happy new year.

2 SPECIAL MASTER JUDGE: I  
3 appreciate that and same thing to  
4 everyone on this call. If anything  
5 comes up, even if it's Christmas Eve, do  
6 not hesitate to reach out and we will  
7 jump on a conference.

8 Everyone have a good holiday and  
9 unless we speak, I will see everyone on  
10 July 4th. I will be sending around -- I  
11 believe we need to send around links for  
12 the status conferences for 2024, is that  
13 correct? No one has received one yet?

14 MR. FORGE: I don't think we  
15 have the 2024 links yet and I think it  
16 was a Freudian slip when you were hoping  
17 to not see us until July 4th. It will  
18 be January 4th.

19 SPECIAL MASTER JUDGE: Yeah.  
20 That was wishful thinking on my part.  
21 Yes. January 4th. I will get those  
22 links out over the weekend.

23 MR. GIUFFRA: July 4th would not  
24 be a good day anyway.

25 SPECIAL MASTER JUDGE: That's

1 true. That's true.

2 Oh, Lord. Maybe -- see that's a  
3 clear error right there.

4 MR. GIUFFRA: See it's very easy  
5 to make a one word mistake.

6 SPECIAL MASTER JUDGE: Nice try.  
7 All right. Thank you everyone. Have a  
8 good holiday.

9 - - - -

10 (Proceedings concluded at 11:40 a.m.)

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C E R T I F I C A T E

I, Pamela S. Greenfield, a Notary Public within and for the State of Ohio, do hereby certify that I attended the foregoing proceedings in their entirety, that I wrote the same in stenotypy, and that this is a true and correct transcript of my stenotype notes.

IN WITNESS WHEREOF, I have hereunto set my hand and seal of office, at Cleveland, Ohio, this 21st day of December, 2023.

 

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Pamela S. Greenfield, CRR, RDR  
Notary Public, State of Ohio  
My commission expires July 2, 2028

[&amp; - adults]

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